LIM WEN JENG

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI MALAYSIA & ORS

FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
NIK HASHIM FCJ
ABDUL AZIZ MOHAMAD FCJ
[CRIMINAL APPEAL NO: 05-69-2008 (B)]
17 NOVEMBER 2008

PREVENTIVE DETENTION: *Detention - Application for habeas corpus - Right to make representation - Advisory Board refused detainee's application for third adjournment to secure presence of witnesses and failed to invoke s. 9 Emergency (Public Order and Prevention of Crime) Ordinance 1969 to summon witnesses - Whether detainee's right to make representations under art. 151(1)(a) Federal Constitution prejudiced*

CONSTITUTIONAL LAW: *Fundamental liberties - Habeas corpus - Right to make representation - Advisory Board refused detainee's application for third adjournment to secure presence of witnesses and failed to invoke s. 9 Emergency (Public Order and Prevention of Crime) Ordinance 1969 to summon witnesses - Whether detainee's right to make representations under art. 151(1)(a) Federal Constitution prejudiced*

This was the appellant's appeal against the High Court's refusal of his application for a writ of *habeas corpus* for his release. The appellant was detained for a period of 18 months with effect from 18 September 2007 pursuant to a detention order dated on the same date issued under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the 'Ordinance'). The advisory board ('the Board') refused the appellant's third application for an adjournment to secure the presence of two witnesses. One witness was under restricted residence whilst the other was the investigating officer of the case. The appellant had earlier sent a letter dated 27 November 2007 requesting the Board to exercise its power under s. 9 of the Ordinance to summon the attendance of the two witnesses. On 28 November 2007 the Board had replied the appellant's letter approving his request to call the two witnesses. The Board, however, did not invoke its powers under s. 9 of the Ordinance but carbon copied its letter of 28 November 2007 to the relevant police branches. The

A reasons given by the Secretary of the Board for not invoking s. 9 of the Ordinance was that the Board had short notice of two days as the hearing was fixed on 29 November 2007. Also, the appellant had failed to make use of the benefit of the two earlier adjournments given to him to obtain the witnesses.

B

Held (dismissing the appeal by a majority)
Per Nik Hashim FCJ with Zaki Tun Azmi CJ concurring (majority):

C **(1)** Section 9 of the Ordinance is not a mandatory procedural requirement that the Board can be compelled to exercise the power of summoning the witnesses as required by the appellant. If the appellant wishes to examine any witnesses, he should make them available at the hearing and no obligation can be cast on the Board to summon them. (para 11)

D

(2) The Board was free to regulate its own procedure within the constraints of the Federal Constitution and the statute. It was open to it in the exercise of that power to limit the time within which the appellant must complete his evidence. That E was because the Board was under an obligation pursuant to s. 9 of the Ordinance to submit its report to the Yang di Pertuan Agong within three months from the date of receipt of the appellant's representations. The proceedings before the Board had to be completed expeditiously. Thus, the reason of F too short a notice given by the Secretary of the Board for not invoking s. 9 was justified. (para 12)

(3) The appellant failed to state specifically as to what evidence the two witnesses would testify before the Board. The G appellant merely averred in his affidavit that the two witnesses were material and without their evidence he would not be able to show his innocence. It is to be noted that the hearing of the representations fixed on 23 October 2007 and 13 November 2007 was adjourned at the request of the H appellant. It appeared therefore that the appellant was not serious enough in his effort to present his representations soonest possible before the Board. With such material before the Board, it would not be unreasonable for the Board to reject his request for a further adjournment of the hearing that I had been fixed on 29 November 2007. Ample opportunity had been given to the appellant to secure the attendance of the

two witnesses but he had failed to make use of the opportunity. Therefore, his right to an opportunity to make representations before the Board as provided under art. 151(1)(a) of the Federal Constitution was not prejudiced. (paras 13 & 14)

Per Abdul Aziz Mohamad FCJ (dissenting):

(1) The only time that the appellant's solicitors might have known that the Board was leaving it to them to bring the witnesses was on 28 November 2007. There was insufficient time for them to secure the attendance of the witnesses. Even the Board found that time was too short for it to summon the witnesses. Furthermore, the Board's letter of 28 November 2007 did not specifically state that the Board was not going to summon the witnesses. The appellant's solicitors might have thought that the Board had already summoned the witnesses pursuant to their application of 9 November 2007 and that the copying of the letter of 28 November 2007 to the police branches was merely a follow-up on the summons. (para 25)

(2) The refusal of the adjournment on 29 November 2007 was made for the wrong reason and was therefore unjustified. The appellant was thereby deprived of his right to have his witnesses to support his representations and that prejudiced his right to an opportunity to make representations. He did make oral representations on 29 November 1997 but without the benefit of the two witnesses who his solicitors claimed were important for his representations. In the circumstances, the appeal should be allowed. (paras 26 & 27)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana menolak permohonan writ *habeas corpus* untuk pembebasannya. Perayu telah ditahan untuk tempoh 18 bulan berkuatkuasa dari 18 September 2007 ekoran satu perintah tahanan bertarikh sama yang dikeluarkan di bawah s. 4(1) Ordinan Darurat (Ketenteraman Awam dan Pencegahan Jenayah) 1969 ('Ordinan'). Lembaga Penasihat ('Lembaga') telah menolak permohonan ketiga perayu untuk penangguhan bagi membolehkan beliau membawa dua orang saksi. Seorang dari saksi tersebut berada di bawah kediaman terhad sementara dan seorang lagi adalah pegawai penyiasat kes.

A Perayu sebelum itu telah menghantar surat bertarikh 27 November 2007 memohon supaya Lembaga melaksanakan kuasanya di bawah s. 9 Ordinan bagi memanggil kehadiran kedua-dua orang saksi. Pada 28 November 2007 Lembaga menjawab surat perayu sekaligus meluluskan permohonannya untuk memanggil kedua saksi-
B saksi. Lembaga bagaimanapun tidak menggunakan kuasanya di bawah s. 9 Ordinan, namun telah menghantar salinan surat bertarikh 28 November 2007 tersebut ke cawangan-cawangan polis yang berkenaan. Alasan yang diberi oleh Setiausaha Lembaga kerana tidak menggunapakai s. 9 Ordinan adalah bahawa Lembaga
C mempunyai notis yang terlalu pendek, iaitu 2 hari, memandangkan tarikh pendengaran telah pun ditetapkan pada 29 November 2007. Juga, perayu telah gagal memanfaatkan dua penangguhan terdahulu yang diberikan kepadanya bagi mendatangkan saksi-saksi.

D **Diputuskan (menolak rayuan melalui keputusan majoriti) Oleh Nik Hashim HMP dengan Zaki Tun Azmi KH menyetujui (majoriti):**

(1) Seksyen 9 Ordinan tidak menyerlahkan satu keperluan prosedur mandatori yang boleh memaksa Lembaga untuk melaksanakan
E kuasanya bagi memanggil saksi-saksi seperti yang dikehendaki oleh perayu. Jika perayu berhasrat untuk memeriksa mana-mana saksi, beliau sendiri harus mendatangkan mereka semasa pendengaran dan tiada obligasi atas Lembaga untuk memanggil
F saksi-saksi tersebut.

(2) Lembaga mempunyai kebebasan untuk mengawalselia prosedurnya sendiri dalam lengkongan peruntukan Perlembagaan Persekutuan dan statut. Adalah terbuka bagi Lembaga dalam melaksanakan kuasanya untuk menghadkan masa dalam mana
G perayu mesti menghabiskan keterangannya. Ini kerana Lembaga bertanggungjawab di bawah s. 9 Ordinan untuk mengemukakan laporannya kepada Yang di Pertuan Agong dalam masa tiga bulan dari tarikh ia menerima representasi perayu. Maka prosiding di hadapan Lembaga harus disiapkan dengan secepat
H mungkin. Oleh itu, alasan notis terlalu pendek yang diberi oleh Setiausaha Lembaga untuk tidak memakai s. 9 adalah berjustifikasi.

I

(3) Perayu gagal menyatakan secara spesifik keterangan apakah yang akan diberikan oleh kedua-dua saksi di hadapan Lembaga. Perayu hanya menyatakan di dalam afidavitnya bahawa kedua-dua saksi adalah material dan tanpa keterangan mereka beliau tidak dapat membuktikan ketidak-bersalahannya. Ianya harus diingat bahawa pendengaran representasi yang ditetapkan pada 23 Oktober 2007 dan 13 November 2007 telah ditangguhkan atas permintaan perayu. Perayu dengan itu nampak tidak berapa serius dalam usaha untuk mengemukakan representasinya dengan secepat mungkin di hadapan Lembaga. Berdasarkan halkeadaan yang wujud di hadapan Lembaga, bukanlah sesuatu yang tidak munasabah bagi Lembaga menolak permohonan untuk menangguhkan lagi pendengaran yang telah ditetapkan pada 29 November 2007 itu. Peluang yang banyak telah diberikan kepada perayu bagi mendapatkan kehadiran kedua-dua saksi tetapi beliau gagal menggunakan peluang yang diberi. Oleh itu, hak beliau kepada peluang untuk mengemukakan representasi di hadapan Lembaga seperti yang diperuntukkan di bawah art. 151(1)(a) Perlembagaan Persekutuan tidak diprejudiskan.

Oleh Abdul Aziz Mohamad HMP (menentang):

(1) Satu-satunya masa di mana peguamcara perayu boleh mengetahui bahawa Lembaga membiarkannya kepada mereka untuk mendatangkan saksi-saksi adalah pada 28 November 2007. Maka tidak wujud masa yang mencukupi bagi perayu untuk mendapatkan kehadiran saksi-saksi tersebut. Lembaga sendiri pun mendapati masa sudah terlalu suntuk untuk memanggil saksi-saksi. Selain itu, surat Lembaga bertarikh 28 November 2007 tidak secara spesifik menyatakan bahawa Lembaga tidak akan memanggil saksi-saksi tersebut. Peguamcara mungkin berpendapat bahawa Lembaga sendiri sudah pun memanggil saksi-saksi ekoran permohonan mereka pada 9 November 2007 dan bahawa salinan surat bertarikh 28 November 2007 kepada cawangan-cawangan polis berkenaan hanyalah satu langkah susulan kepada pemanggilan tersebut.

(2) Keengganan penangguhan pada 29 November 2007 dibuat atas alasan yang salah dan dengan itu tidak berjustifikasi. Perayu dengan itu telah tidak diberikan haknya untuk memanggil saksi-saksi bagi menyokong representasinya dan itu telah memprejudiskan haknya kepada peluang untuk membuat

representasi. Beliau memang telah membuat representasi lisan pada 29 November 1997 namun tanpa manfaat kedua-dua saksi tersebut yang menurut peguamcara perayu adalah penting bagi representasinya. Dalam keadaan ini, rayuan seharusnya dibenarkan.

Case(s) referred to:
AK Roy v. Union of India AIR [1982] SC 710 ***(refd)***
Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 HC ***(refd)***

Legislation referred to:
Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 4(1), 9, 11
Federal Constitution, arts. 151(1)(a), (3)
Public Order and Prevention of Crime (Procedure) Rules 1972, r. 3(2)

For the appellant - Suresh Thanabalasingam (Alvinthiren & P Visnuvarman with him); M/s Kuldip & Co
For the respondents - Abd Wahab Mohamed SFC

[Appeal from High Court, Shah Alam; Criminal Application No: 1-44-237-2007]

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim FCJ:

[1] The appellant was detained for a period of 18 months with effect from 18 September 2007 pursuant to a Detention Order dated on the same date issued under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 (the Ordinance). His application for a writ of *habeas corpus* for his release was refused by the Shah Alam High Court on 13 June 2008. Hence his appeal to this court.

[2] The appellant had averred in his affidavit in support of the application at p 20 para 30 of the record that during the hearing before the advisory board (the board) he had made an application for an adjournment as the two witnesses requested by him were not present. In reply to the said averment the Secretary of the Board in her affidavit at p 127 para 8 of the record averred that the hearing of the appellant's representations was adjourned twice

on 23 October 2007 and 13 November 2007 at the request of the appellant on the ground that his counsel Encik Suresh was unable to attend the hearing. The Secretary further averred that the appellant's counsel had sent a letter dated 27 November 2007 requesting the board to exercise its power under s. 9 of the Ordinance to summon the attendance of two witnesses requested by the appellant namely, Fong Mun Cheong who was under restricted residence in Kuala Terengganu and the Investigation Officer of the case (see p 150 of the record). The next hearing date was 29 November 2007.

[3] On 28 November 2007 the board replied the appellant's letter whereupon the board approved his request to call the two witnesses.

[4] It is worthy of note that though the board did not invoke its powers under s. 9 of the Ordinance, it nevertheless carbon copied its letter to the Ibu Pejabat Polis Daerah Kuala Terengganu where the witness Fong Mun Cheong was residing under restricted residence and to the Ketua Penolong Pengarah Jabatan Siasatan Jenayah D7, Bukit Aman Kuala Lumpur where the Investigation Officer was attached. The reason for not invoking s. 9 of the Act as averred by the Secretary was because of the short notice of two days and the failure of the appellant to avail himself of the benefit of the two earlier adjournments to obtain the witnesses as requested by him.

[5] In dismissing the appellant's application on the ground that the appellant had failed to establish non-compliance of the procedure on the part of the board, the learned High Court judge (Syed Ahmad Helmy J) said:

> Upon evaluating the affidavit evidence filed herein, namely enclosures 3 and 19 affirmed by the applicant and the opposing affidavits of the Secretary of the Advisory Board in enclosures 13 and 20, I am of the considered view that section 9 of the Ordinance is an empowering section which confers powers on the Advisory Board to summon witnesses and compel the production of documents. It is the prerogative of the Board to exercise such powers and it cannot be compelled to exercise such power as contended and urged by the applicant in the instant case as the Board was acting within its prerogative by not issuing summonses for the attendance of the 2 witnesses requested by the applicant. The non-invocation of its power under section 9 does not in any

A way prejudice the applicant more so in the light of the Board's approval for the applicant to call the 2 witnesses, which the applicant can do by writing to the Chief Police Officer of Terengganu and/or to the Minister of Home Affairs for the production of the two witnesses. Interestingly there is no evidence of any attempt made by the applicant to secure their attendance.

B

[6] Before us, learned counsel for the appellant contended essentially on two grounds:

(i) Section 9 is a mandatory procedural requirement that must be
C exercised by the board when requested by the appellant to do so. Failure to do so would amount to a breach of mandatory procedural requirement by the board.

(ii) The right of the appellant for representations is being
D guaranteed under art. 151(1)(a) of the Federal Constitution (the Constitution). The failure of the board to invoke s. 9 on summoning the witnesses required by the appellant after application had been made shall invalidate his Detention Order because his right for representations had been prejudiced.

E The case of *Puvaneswaran Murugiah v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1991] 2 CLJ 1199; [1991] 3 CLJ (Rep) 649 was cited in support.

[7] The thrust of the appellant's contention in this case is that
F the failure of the board to invoke s. 9 contravenes his constitutional right under art. 151(1)(a) of the Constitution thereby prejudicing his right for representations before the board.

[8] To put the matter in perspective, it will be useful to
G reproduce s. 9 of the Ordinance and art. 151(1)(a) of the Constitution. Section 9 reads as follows:

Power to summon witnesses

Every Advisory Board shall, for the purposes of this Ordinance,
H but subject to the provision of section 11, have all the powers of a Court for the summoning and examination of witnesses, the administration of oaths or affirmations, and for compelling the production of documents.

I

Article 151 provides:

> **Restrictions on preventive detention**
>
> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention:
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him on the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) …
>
> (2) …
>
> (3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[9] On the appellant's right for representations before the board, the learned Senior Federal Counsel for the respondent drew our attention to the case of *A.K. Roy v. Union of India* AIR [1982] SC 710 where the Indian Supreme Court said at p 751 para 105:

> … The detenu may therefore offer oral and documentary evidence before the Advisory Board in order to rebut the allegations which were made against him. We would only like to add that if the detenu desires to examine any witnesses, he shall have to keep them present at the appointed time and no obligation can be cast on the Advisory Board to summon them. The Advisory Board, like any tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the detenu must complete his evidence. We consider it necessary to make this observation particularly in view of the fact that the Advisory Board is under an obligation under section 11(1) of the Act to submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned. The proceedings before the Advisory Board have therefore to be completed with the utmost expedition.

[10] In my opinion, the above principle is equally applicable to our case.

[11] In the present case, s. 9 of the Ordinance is quite clear in its provision. I agree with the learned judge that the section is an empowering provision which, subject to disclosure under s. 11 of facts or production of documents which are against the national interest to disclose or produce (see also art. 151(3) of the Constitution), confers powers on the board to summon witnesses and compel the production of documents. By its terms, s. 9, (unlike r. 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 which requires service of certain number of copies of Form 1 as ruled in *Puvaneswaran, supra*, as a mandatory requirement), is not a mandatory procedural requirement that the board can be compelled to exercise the power of summoning the witnesses as required by the appellant. If the appellant wishes to examine any witnesses he should make them available at the hearing and no obligation can be cast on the board to summon them.

[12] The board, like any other tribunal, is free to regulate its own procedure within the constraints of the Constitution and the statute. It would be open to it, in the exercise of that power to limit the time within which the appellant must complete his evidence for the board is under an obligation under s. 6(1) of the Ordinance to submit its report to the Yang diPertuan Agong within three months from the date of receipt of the appellant's representations by the board. The proceedings before the board have to be completed expeditiously. Thus, the reason of too short a notice given by the Secretary for not invoking s. 9 to summon the two witnesses by the board as requested by the appellant cannot be said to be unjustified.

[13] Moreover, the appellant had failed to state specifically as to what evidence the two witnesses would testify before the board. The appellant in his affidavit at p 20 para 30 merely averred that the two witnesses were material and without their evidence he would not be able to show his innocence ("Pihak kami telah memaklumkan bahawa mereka adalah saksi yang amat material dan tanpa mereka, saya tidak dapat menunjukkan ketidakbersalahan saya"). It is to be noted that the hearing of the representations fixed on 23 October 2007 and 13 November 2007 before the board was adjourned at the request of the appellant. It appears therefore that the appellant was not serious enough in his effort to present his representations soonest possible before the board. With such material before the board, it would not be unreasonable

for the board to reject his request for a further adjournment of the hearing that had been fixed on 29 November 2007. Ample opportunity had been given to the appellant to secure the attendance of two witnesses but he had failed to avail himself of the opportunity. And therefore, because of his failure, his right to an opportunity of making representations before the board as provided for under art. 151(1)(a) of the Constitution cannot be argued to have been prejudiced.

[14] In my view, there is no non-compliance of the procedural requirement in this case. The rejection of the appellant's request for the third adjournment of the hearing and the refusal of the board to invoke s. 9 to summon the two witnesses were made lawfully. Consequently, I find no reason for interference with the impugned order and dismiss the appeal.

[15] My learned brother Zaki Tun Azmi, Chief Justice concurred with me in this judgment while my learned brother Abdul Aziz Mohamad, FCJ dissented in his separate judgment.

Abdul Aziz Mohamad FCJ:

[16] The appellant's complaint is that the advisory board refused his application for an adjournment in order to secure the presence of two witnesses, and therefore his right to an opportunity of making representations, guaranteed by art. 151(1)(a), had been prejudiced.

[17] The respondents' stand on this point is as follows.

[18] The hearing had been adjourned twice, on 23 October 2007 and 13 November 2007, at the request of the appellant because his counsel was unable to be present. The next hearing date was 29 November 2007.

[19] On 27 November 2007, just two days before the hearing date, the appellant's solicitors, who were aware of the hearing date, wrote to the Chairman of the advisory board an application that the board exercise its powers under s. 9 of POPOC and summon two witnesses to be present at the hearing. They were Fong Mau Choong, a Kuala Terengganu restricted resident, and the 1.0. The solicitors said that the witnesses would be able to show that the appellant was innocent.

[20] On 28 November 2007 the Chairman of the Advisory Board wrote to the appellant's solicitors giving consent to their bringing the two witnesses to the hearing next day. The letter was copied to the police branches where the witnesses were. But the Board itself did not summon them.

[21] The advisory board's reason for not summoning the witnesses under s. 9 was because time was too short for it, the hearing being on 29 November 2007. The implication is that if the application had been made in sufficient time the advisory board would have summoned the witnesses.

[22] On 29 November 2007 the witnesses – as was to be expected – were not present at the hearing and the appellant's counsel applied for another postponement so that the witnesses could be present. The advisory board refused the adjournment because, according to its Secretary, the appellant's solicitors had not utilized the time afforded by the two previous adjournments to apply for the summoning of the witnesses.

[23] That is the respondents' stand. The appellant's stand is that the advisory board was mistaken in its reason for refusing the adjournment – that the appellant's solicitors had failed to avail themselves of the opportunity afforded by the two previous adjournments – because on 9 November 2007 the appellant's solicitors had already written to the advisory board to apply for the summoning of the two witnesses. The appellant averred that the advisory board received the letter on 12 November 2007. The letter is exhibited and bears the acknowledgment of receipt by the advisory board dated 12 November 2007. In fact, except for dates, the subsequent letter of 27 November 2007 was a replica of that letter of 9 November 2007.

[24] The Secretary to the advisory board, in replying to the appellant's averments about the letter of 9 November 2007, did not make any statement about the letter. She did not deny its existence or receipt. Instead, this time she stated that the appellant and his solicitors had been given an opportunity to take steps to themselves bring the witnesses but had failed to avail themselves of the opportunity.

[25] Now the only time that the appellant's solicitors might have known that the advisory board was leaving it to them to bring the witnesses was on 28 November 2007. There was insufficient time for them to themselves secure the attendance of the witnesses. Even the advisory board found that time was too short for it to summon the witnesses. Furthermore, the advisory board's letter of 28 November 2007 did not specifically state that the board itself was not going to summon the witnesses. The appellant's solicitors might have thought that the advisory board had already summoned the witnesses pursuant to their application of 9 November 2007 and that the copying of the letter of 28 November 2007 to the police branches was merely a follow-up on the summons.

[26] Hence the refusal of the adjournment on 29 November 2007 was made for the wrong reason and was therefore unjustified. The appellant was thereby deprived of his right to have his witnesses to support his representations and this prejudiced his right to an opportunity to make representations. He did make oral representations on 29 November 2007 but without the benefit of the two witnesses, who his solicitors claimed were important for his representations.

[27] I would therefore allow the appeal.